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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT ALAN CHANEY, Defendant and Appellant.	G036049 (Super. Ct. No. 03WF1320) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Carl Fabian, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A.2., II.B., II.C., and II.D.

Robert Alan Chaney appeals from the judgment sending him to prison for two consecutive, indeterminate 14-years-to-life terms plus a consecutive 10-year term, after a jury convicted him of three counts of kidnapping during the commission of a carjacking. (See Pen. Code, § 209.5.)[1] He was also convicted of the lesser included offense of carjacking, but that was dismissed by the trial court. Subsequently, the court found Chaney had three prior prison terms (see § 667.5, subd. (b)), one prior serious felony conviction (see § 667, subd. (a)), and one prior "strike" conviction. (See §§ 667, subds. (b)-(i); 1170.12.)

On appeal, Chaney contends the trial court erred in admitting a nontestifying witness's statement because it allegedly violated his right to confront and cross-examine a witness under the Sixth Amendment. (See *Crawford v. Washington* (2004) 541 U.S. 36; see also *Davis v. Washington* (2006) __ U.S. __ [126 S.Ct. 2266].) In the unpublished portion of our opinion, we address his other contentions: the allegedly erroneous admission of other, uncharged acts of violence; the allegedly erroneous jury instructions; the insufficiency of evidence to sustain the kidnapping charges; and the trial court's discovery ruling following the in camera hearing to review the police officers' confidential personnel files. In that last issue, he requests we review the sealed transcript of that closed hearing and, from our examination, determine the rectitude of the trial court's ruling on his motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531. We affirm.

I

FACTS

Police officers, carrying an arrest warrant for Chaney, approached his address in Garden Grove in 2003, when they heard a woman's screams. Suddenly, Chaney emerged from an apartment and ran along the balustrade and back into the

[1] All further section references are to the Penal Code unless otherwise stated.

apartment. The officers surrounded the apartment and knocked repeatedly. A woman, crying hysterically, eventually opened the door and frantically pointed towards the living room, which was occupied by three other sobbing women and an upset child. Chaney could be seen standing next to a sliding glass door which was open to the balcony.

Kevin La Croix, a sergeant with the Garden Grove Police Department, drew his gun and ordered Chaney to lie down. Instead, Chaney leapt from the second-story balcony into a tree and then lowered himself to the ground. He then immediately sprinted from the area.

Reina Lopez, the woman who had opened the door, was hyperventilating and crying hysterically. One of the officers attempted to calm her, although the most he was able to do was to get her to breathe normally while she continued to sob. He managed to learn from her that Chaney had held a long-bladed knife to her throat and yelled, "you fucking bitch; you called the cops!" Chaney then sliced off a piece of coaxial cable to bind the women but was interrupted by the officers' entry before he was able to do it. It was at that point he leapt from the balcony.

Outside, other officers pursued Chaney on foot, with two officers striking him in the arm and leg with their batons, and a third officer spraying him with pepper spray. None of their actions seemed to impede Chaney. However, they heard Chaney drop something metallic as he scaled a tall block wall. The officers grabbed the item, which turned out to be a knife with an eight-inch blade.

Rounding the wall, the officers fanned out into the parking lot on the other side, looking for Chaney. Unfortunately, before they located him, he spotted an middle-aged woman, Guadalupe Garcia, sitting in her Nissan Altima outside a grocery store, along with her nine-year-old son and three-year-old grandson. He darted towards her passenger door and opened it before she was able to lock it. Screaming threats to kill her, he ordered her to drive away. Upset and terrorized, she tried to do as he commanded but apparently not fast enough to satisfy him. He grabbed her arm and began shaking her.

She told him she would do whatever he wanted as long as he didn't hurt her or the children.

Garcia started driving out of the parking lot, but the officers became suspicious of the vehicle and blocked its path. Chaney ducked down under the dashboard of the car, demanding Garcia keep driving. When she did not respond, he reached over and pressed the accelerator with his hand, but the car was in park and did not move. The officers then observed Chaney lunge towards Garcia, and one officer opened fire through the front windshield, striking Chaney in the hip. Even this did not subdue him: He continued to flail his arms and legs against the officers, resisting their efforts to handcuff and remove him.

At trial, Chaney responded to the charges by calling his then-divorced wife, Shannon Chaney, to testify that Garden Grove police officers had told her that they would shoot the defendant if he continued to evade their arrest. The last threat had been delivered to her at her home the day of, or just before Chaney's arrest, although similar statements had been made to her five or six times previously. She had relayed these warnings to Chaney.

II

DISCUSSION

A. Admission of Lopez's Statements

1. Right of Confrontation Violation

Chaney contends the trial court erred when it permitted James Colegrove, a police sergeant with Garden Grove Police Department, to testify that Lopez told him that Chaney refused to let any of the women in the apartment open the door to the officers. She related that he got angry, yelling at them, "You bitches, you called the cops!" He then followed her into a back bedroom and threatened her with the knife. He held her there for about 10 seconds and then bent down, cut a length of coaxial cable from a

television connection and told them he was going to tie them up. He then went to peer through the front door peephole and again refused to open the door to the police.

Chaney contends admission of these statements by Lopez to Colegrove denied him his right to confront and cross-examine an adverse witness. (See *Crawford v. Washington, supra,* 541 U.S. at 52-54.) He argues that statements given spontaneously by a declarant while under the excitement of an event are inadmissible when they relate to events having transpired already, as distinct from those which might occur in the future. (See *Davis v. Washington, supra,* __ U.S. __ [126 S.Ct. 2266].) And, as he claims these statements' admission cannot be shown to be harmless beyond a reasonable doubt, the error requires a reversal of the conviction. (See *People v. Archer* (2000) 82 Cal.App.4th 1380, 1394.)

The Attorney General contends the issue was waived[2] because Chaney never gave as his grounds for the objection that there was a constitutional violation. (See Evid. Code, § 353.) Chaney responds that one of the enunciated reasons for the objection was that he was unable to cross-examine the declarant, thus *implying* the constitutional ground. But, as noted by the Attorney General, the inability to cross-examine a declarant is a definitional characteristic of any *hearsay*; it does not necessarily trigger constitutional considerations.[3]

Based on the context of the objection as well as its language, the objection was one of hearsay, not the Sixth Amendment. In *People v. Alvarez* (1996) 14 Cal.4th 155, an analogous, ambiguous ground for objection was deemed insufficient to preserve the constitutional issue for appeal. (*Id.* at pp. 186-187.) Chaney replies that *Alvarez* was

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[2] We note that the terms, waiver and forfeiture, have been used interchangeably even when the situation is distinctly one or the other. (See *People v. Williams* (1999) 21 Cal.4th 335, 340, fn. 1.)

[3] As noted by the Attorney General, it is clear that all parties at trial accepted the objection to be one of hearsay. At the time of the objection, the defense *stated*: "So I understand it's a hearsay exception, but it's also my understanding that she was arrested for a warrant herself. So she has a reason to lie to the police and I have no way of examining her on her reasons for that statement." The trial court then clarified that the prosecution would not object to the jury learning of that outstanding warrant for Lopez, and also informed the prosecutor he would have to lay the foundation to meet the requirements of the hearsay exception found in Evidence Code section 1240. Although given the opportunity by the trial court, the defense argued nothing further on the Lopez statement.

decided before *Crawford*, and that timing was pivotal. He argues *Alvarez* would have been decided differently had the California Supreme Court considered the same situation after *Crawford.*

In *Alvarez*, the defense moved the court in limine to bar the prosecution from introducing certain statements because they were inadmissible hearsay. The court determined the statements fell within the exception to the hearsay rule for spontaneous declarations made "'while the declarant was under the stress of excitement caused by such'" act or event. (*People v. Alvarez, supra*, 14 Cal.4th at p. 185.) The defense argued on appeal, however, that the statements violated the Sixth Amendment. This argument was deemed waived even though one line in the written in limine motion "refer[red] to the 'confrontation rule' (capitalization deleted) . . . ." (*Id.* at p. 186.)

Chaney invokes language from *People v. Partida* (2005) 37 Cal.4th 428 to rebut the point: "If the trial objection fairly informs the court of the analysis it is asked to undertake, no purpose is served by formalistically requiring the party also to state every possible legal consequence of error merely to preserve a claim on appeal that error in overruling the objection had that legal consequence." (*Id.* at p. 437.) He characterizes his objection as sufficient to trigger the constitutional argument even though no mention of constitutionality was ever made. He deems the reference to cross-examination synonymous with the Sixth Amendment protection although that provision has both cross-examination and confrontation characteristics. Thus, he contends, the mention of cross-examination was sufficient, considering the broadened approach expressed in *Partida*.

In *Partida*, the defendant objected at trial to evidence concerning his gang affiliation and characteristics as being more prejudicial than probative. No mention was made that admission of such evidence would deny him due process of law. On appeal, he argued that the court erred in overruling his objection *and* that the error had the *consequence* of violating his due process rights. Neither of *those* arguments was waived.

(*People v. Partida*, *supra*, 37 Cal.4th at p. 435.) But the objection failed to preserve the argument that due process required the statement's exclusion. (*Ibid.*)

Partida has not "broadened" the general rule requiring a timely and specific objection to evidence. (See Evid. Code, § 353, subd. (a).) To the contrary, the *Partida* court reiterated that "a trial objection must fairly state the specific reason *or reasons* the defendant believes the evidence should be excluded. If the trial court overrules the objection, the defendant may argue on appeal that the court should have excluded the evidence for a reason asserted at trial. *A defendant may not argue on appeal that the court should have excluded the evidence for a reason not asserted at trial*. A defendant may, however, argue [on appeal] that the asserted error in overruling the trial objection had the legal *consequence* of violating due process." (*People v. Partida, supra*, 37 Cal.4th at 431, italics added.) Thus, if anything, the *Partida* court has strengthened application of the statutory rule but simultaneously clarified how the restricted evidentiary argument may yield *other* appellate arguments. Nonetheless, "he may not argue that the court should have excluded the evidence for a reason different from his trial objection. If he had believed at trial, for example, that the trial court should engage in some sort of due process analysis that was different from the Evidence Code section 352 analysis, he could have, and should have, made this clear as part of his trial objection. He did not do so. Accordingly, he may not argue on appeal that due process required exclusion of the evidence for reasons other than those articulated in his Evidence Code section 352 argument." (*Id.* at p. 435.)

Likewise, Chaney cannot now argue the trial court denied him his Sixth Amendment right to confront all witnesses as held in *Crawford*. (See *People v. Sanders* (1995) 11 Cal.4th 475, 512, fn. 4.) A *Crawford* analysis is distinctly different than that of a generalized hearsay problem. *Crawford* established that the Sixth Amendment bars the "admission of testimonial statements of a [declarant] who [does] not appear at trial *unless* he was unavailable to testify, and the defendant had had a prior opportunity for cross-

examination." (*Crawford v. Washington, supra,* 541 U.S. at pp. 53-54, italics added.) That rule was further clarified in *Davis v. Washington, supra,* __ U.S. __ [126 S.Ct. 2266] when the court held that "testimonial statements" are only those statements that cause the declarant to be a witness within the meaning of the Sixth Amendment, such as statements in response to police interrogations designed to elicit evidence to convict a defendant of a crime. (*Id.* at p. __ [126 S.Ct. at 2273-2274].)

For instance, in the consolidated case with *Davis,* Amy Hammon was forced to sign an affidavit charging her husband with domestic violence and that affidavit was used to convict him on the charge at trial after she refused to testify. Such an out-of-court statement, obtained by the police specifically for the purpose of criminal prosecution, constitutes the testimonial evidence requiring the constitutional protection of cross-examination and confrontation. Statements are *not* testimonial, however, "when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." (*Id.* at p. __ [126 S.Ct. at p. 2273].)

The constitutional considerations involved in a confrontation clause issue require far more of a trial court's determination than merely deciding if cross-examination has been met or will be possible. As the purpose of Evidence Code section 353 is to provide the trial court and any moving party the opportunity to meet and cure any defect to which an objection has been made (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 101), Chaney has failed to comply with that statutory requirement, and the issue is therefore waived for appellate review.

Fearing we will reject his argument due to the defective objection, Chaney proposes that he will bring a petition for habeas corpus alleging his trial counsel ineffectively represented him by failing to voice the proper ground. Such a procedure, he complains, will be a "waste of precious judicial resources and taxpayer dollars . . ." when the argument is already sufficiently preserved for review.

To forestall that process, we choose to address the issue on its merits even though it was waived by failure to specifically object. The argument, however, fails to persuade us in this instance. The questions posed to Lopez by Colegrove were asked to determine the *exact nature* of the emergency. The officers had approached the apartment to serve an arrest warrant, and they were met with a screaming, hysterical group of people who were wild and incomprehensible even after Chaney had fled. Colegrove's inquiry was not directed to the simple task of serving the warrant; it was directed at determining what had happened, what *might* happen in the next few minutes, and the nature of the emergency involved. As such, Lopez's answers fell under the *Davis* definition of nontestimonial statements, as distinct from testimonial statements as defined in the companion case of *Hammon*. (See *Davis v. Washington, supra,* __ U.S. at pp. __-__ [126 S.Ct. at pp. 2272-2279]; see also *People v. Salinas* (2007) 146 Cal.App.4th 958, 961-962 [no *Crawford* violation when criminalist testified, based on another criminalist's report, that substance contained methamphetamine, because that report was nontestimonial in nature].)

2. Discretionary Abuse

Chaney contends the trial court abused its discretion when, over the defense objection, it allowed the Lopez statements proving he committed *uncharged* crimes against her and the other three women in the apartment. He also characterizes the statements as bad character evidence in that they intimated that Chaney was a misogynist who called the women pejorative names—"bitches"—and who tried to tie them up with the cable after threatening to kill them.

When the defense objected, the court noted Lopez's statements to Colegrove were evidence rebutting Chaney's defense of necessity or duress,[4] in that they

[4] The defenses of duress or necessity—the terms are often used interchangeably although elementary differences exist between the two—were each defined for the jury by the court in its instructions. The defense of duress was described as follows: "A person is not guilty of a crime when he engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances: [¶] (1) Where the

undermined his now-asserted fear of the Garden Grove Police. The defense *agreed.* On appeal, Chaney contends Lopez's statements were entirely irrelevant, highly prejudicial and inflammatory, and they thus denied him due process of law. Assuming arguendo *some* relevancy existed, Chaney argues the court still abused its discretion in admitting them as their prejudicial impact far outweighed any probative value. (Cf. Evid. Code, § 352; *People v. Sam* (1969) 71 Cal.2d 194, 205-206.)

Review of evidentiary rulings made for relevancy and under Evidence Code section 352 invokes the standard applicable to all evidentiary decisions: The trial court is vested with broad discretion in such matters and will be affirmed on appeal unless shown to have made such rulings in "an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. . . ." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124; see also Cal. Const., art. VI, § 13.)

The trial court explicitly found the statements relevant as they rebutted the defense on which Chaney conceded he was relying. At trial, Chaney agreed. Thus, we review only the court's decision weighing that probative value with its prejudicial impact.

A ruling under Evidence Code section 352, whether explicit or implicit, must be reviewed to see if the trial court performed its statutory balancing function. It need not be a verbatim recitation of each step of the balancing process. The implicit weighing between probity and prejudice is sufficient if it appears from the record the trial court was aware of its responsibility under Evidence Code section 352 and made its

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threats and menaces are such that they would cause a reasonable person to fear that his life would be in immediate danger if he did not engage in the conduct charged, and [¶] (2) If this person then actually believed that his life was so endangered. [¶] This rule does not apply to threats, menaces, and fear of future danger to his life." (CALJIC No. 4.40, as given.) The defense of necessity was then defined as follows: "A person is not guilty of a crime when he engages in an act, otherwise criminal, through necessity. The defendant has the burden of proving by a preponderance of the evidence all of the facts necessary to establish the elements of this defense, namely: [¶] (1) The act charged as criminal was done to prevent a significant and imminent evil, namely a threat of bodily harm to oneself; [¶] (2) There was no reasonable legal alternative to the commission of the act; [¶] (3) The reasonably foreseeable harm likely to be caused by the act was not disproportionate to the harm avoided; (4) The defendant entertained a good-faith belief that his act was necessary to prevent the greater harm; [¶] (5) That belief was objectively reasonable under all the circumstances; and [¶] (6) The defendant did not substantially contribute to the creation of the emergency." (CALJIC No. 4.43, as given.)

decision in light of that. (See *People v. Hinton* (2006) 37 Cal.4th 839, 892.) Chaney raised the statutory provision in his objection, and that satisfies the requirement that the court be on notice of the type of ruling it must make. Statements by a trial court that the evidence had "'some probative value'" and that the evidence "was 'an appropriate area to cover'" satisfied the record requirements in *Hinton* and, similarly, here.[5] (*Ibid.*)

Contrary to Chaney's insistence, Lopez's statements were not admitted to *prove* past uncharged criminal conduct. Such evidence has very limited use and admissibility: "to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) Nothing in Lopez's statements related to such *past* misconduct as evidence to show his intent or common plan with his presently charged criminal conduct. The statements were relevant only to disprove his allegations of excuse for these *charged* criminal acts.

Chaney argues it is irrelevant whether the trial court *intended* the statements to be used as evidence of past misconduct under Evidence Code section 1101, subdivision (b). The entire reason that such evidence may only be admitted after very careful and thoughtful review (see *People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1444-1445; see also *People v. Balcom* (1994) 7 Cal.4th 414, 425-427) is that evidence of bad acts does nothing more than cast a person as a criminal based solely on a perceived *propensity* to commit crime. Such evidence is *inadmissible*. (Evid. Code, § 1101, subd. (a).) Chaney argues that the *details* of his imprisonment of Lopez, his epithets at the women, and his use of the knife on Lopez, did nothing to rebut his perceived fear of bodily harm at the hands of the police. It did much, he argues, to paint him as a

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[5] The court asked, "Would it be relevant to negate that defense?" The court then determined that the prosecutor would lay the proper foundation for the statements *and* stipulate to informing the jury the declarant had an outstanding arrest warrant. This was followed by the court's expressed decision, "In light of that [turning to the prosecutor,] . . . you need to lay the foundation you offered up."

misogynistic animal that viciously attacks women who allegedly "rat him out" to the police.

Those "details" proved Chaney did not meet the defense elements of either duress or necessity. Under the duress defense, Chaney bore the burden of proving that he believed his life would be in danger *unless* he engaged in the charged crime, i.e., carjacking Garcia's car and kidnapping the three occupants. His conduct at the apartment disputed that point quite vividly: He was more interested in taking vengeance on the women who he believed had called the cops than he was in escaping the police. Similarly, under the necessity defense, he had to show there was no "reasonable legal alternative to the" carjacking,[6] which was necessary "to prevent a significant and imminent evil, namely a threat of bodily harm to" himself. (See fn. 4, *ante*.) He also had to show that his criminal act was "necessary to prevent the *greater* harm" to himself, and that he did "not substantially contribute to the creation of the emergency." (*Ibid;* italics added.) The harm and danger to the Garcia family was far greater than his fear of personal police brutality, and—moreover—he substantially contributed to the creation of the emergency by fleeing the Lopez apartment in the manner he did, and by engaging in the criminal acts. Thus, his words and conduct in Lopez's apartment were quite relevant, as the trial court found.

Assuming some error occurred, Chaney has failed to show how this resulted in a manifest miscarriage of justice. (See *People v. Marks* (2003) 31 Cal.4th 197, 226-227 [§ 352 ruling does not implicate constitutional dimension and is thus controlled by harmless error standard]; see *People v. Watson* (1956) 46 Cal.2d 818, 835-836.) The statements did not amplify or corroborate Garcia's testimony, or that of the officers at the scene of the carjacking, and that evidence was the proof of the charged

[6] It is curious that no one addressed the obvious legal alternative available to Chaney: He could have easily turned himself over to the custody of the Orange County Sheriff's Office at the Orange County Jail if he was in fear of police brutality at the hands of the Garden Grove Police Department, and thereby avoided arrest by them.

crime. The evidence of the actual charges was quite overwhelming. Lopez's statements may have defeated the defense's affirmative case, but with-or-without it, the actual charges were proven beyond a reasonable doubt. Therefore, had the trial court erred in the statement's admission, it was harmless.

B. Jury Instructions

1. Refusal to Instruct on the Lesser Offense of Simple Kidnapping

The trial court refused the defense request for instruction on the lesser included offense of simple kidnapping. It found simple kidnapping required *greater* asportation of the victim than does the more specialized offense of kidnapping during the commission of a carjacking, and thus, was not a *necessarily* included offense, requiring instruction. Chaney argues it *is* a lesser included offense, and instruction was mandatory under *People v. Breverman* (1998) 19 Cal.4th 142 at pages 160-161. The Attorney General responds that *generally* the trial court is required to instruct on all lesser included offenses (see *People v. Barton* (1995) 12 Cal.4th 186, 194-195), and simple kidnapping is a lesser included offense of kidnapping during the commission of a carjacking. (See *People v. Russell* (1996) 45 Cal.App.4th 1083, 1088-1089 [in dicta, simple kidnapping stated as lesser offense to kidnapping during carjacking]; see also *People v. Bailey* (1974) 38 Cal.App.3d 693, 699 [simple kidnapping is lesser offense within kidnapping for robbery].) However, on review after conviction, an exception to that general rule exists if the evidence of guilt of the lesser offense is *not* "'substantial enough to merit consideration' by the jury." (*People v. Breverman, supra*, 19 Cal.4th at p. 162.) In other words, there must be sufficient evidence from which a jury composed of reasonable persons could conclude the lesser offense was committed *but not the greater*. (*Ibid.*)

That could not be said in this case. Chaney made it quite clear that he wanted Garcia to drive him away from the scene and out of the clutches of the approaching officers. The only purpose to the kidnapping was to facilitate the carjacking. He argues, however, that the children in the back seat—a fact that he contends the

prosecution failed to prove he was even aware of—were taken without any relationship or connection with the carjacking. If anything, their presence was completely coincidental, *and* he never intended to kidnap two children when he was not even aware of their presence.[7]

Chaney then argues that the jury could have found him guilty of the simple kidnapping of the two children, even if he didn't know they were there, as their taking was not to facilitate the carjacking. Case law contradicts this proposition: A defendant cannot move a kidnapping victim with the necessary intent without knowing the victim is even present. (See *People v. Jones* (2003) 108 Cal.App.4th 455, 462.) "[A]s to minors or others incapable of giving consent a person is guilty of [simple] kidnapping . . . '*only if the taking and carrying away is done for an illegal purpose or with an illegal intent.*' [Citations.]" (*Ibid*. [Original emphasis.])

Chaney's argument rests on the fact that all but one of the officers failed to see the children seated in the back seat of the Altima, and the one officer who noticed a child observed only one of them. Thus, he concludes there is a dearth of evidence that he knew of the children's presence. The Attorney General, however, notes Chaney was *inside* the car and not outside, as were the officers. Moreover, Garcia told him that she would comply with his orders as long as he did not hurt her *or her children.* Chaney's argument is essentially a disputation against the *circumstantial* nature of the evidence proving he took the children, a matter which the jury resolved against him,[8] and which we must accept in favor of that resolution, considering those circumstances. (See 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 145, pp. 206-208 [on

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[7] He argues the record is devoid of any evidence that he personally knew of the children's presence. He notes that the officers outside of the car did not notice the children, excepting Keely who saw only one child in the back seat. From this, he extrapolates the prosecution failed to prove he knew of the children's presence.

[8] The jury received the appropriate instructions defining circumstantial evidence and assessing the sufficiency of it to prove intent. (See CALJIC Nos. 2.00 and 2.02, as given.)

appeal, inferences drawn from circumstantial evidence must be accepted if jury properly instructed].)

Chaney responds that he *could have been* unaware of the children when he first commandeered control of the car. However, after Garcia started driving, he *might have become* aware of the children, and—still desiring to get away—insisted Garcia continue driving. At that point, he was guilty of the simple kidnapping of the children, yet it was not a taking to *facilitate* the carjacking which had already commenced.[9]

Such speculation is insufficient to qualify as "substantial enough to merit consideration by the jury." (*People v. Breverman*, *supra*, 19 Cal.4th at 162.) Without sufficient evidence to prove the lesser offense, instructions on that lesser offense are not mandated. (*Ibid.*) If Chaney did not know the children were present, he was not guilty of *either* the greater or lesser offense. If he did—and the jury found he did—the evidence supported the greater charge.

2. Instructions Regarding Prior Convictions

The trial court instructed the jury that it could consider a witness's prior felony conviction in assessing his or her credibility. (See CALJIC Nos. 2.20 and 2.23, as given.) Chaney contends this was erroneous because the sole witness with a felony conviction was his former spouse, Shannon, who testified for him. Her felony conviction was for felonious possession of marijuana, which did not meet the definition of a crime of moral turpitude. (Cf. *People v. Castro* (1985) 38 Cal.3d 301, 316-317 [possession of drugs is not moral turpitude].) Thus, the jury could not properly use it in assessing Shannon's credibility yet was never informed of that. Because she was Chaney's sole defense witness, Chaney characterizes this instructional error as undermining his entire defense case, thus prejudicial and requiring reversal.

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[9] For kidnapping during the commission of a carjacking, the taking of the victim with the intent to facilitate the carjacking must occur at the commencement of the carjacking. (See CALJIC No. 9.54.1, as given.)

Chaney had the opportunity to craft an amplification or clarification to the standard instructions yet failed to do so. (See *People v. Fraser* (2006) 138 Cal.App.4th 1430, 1452 [in dicta, court noted general rule that failure to craft amplification waives instructional issue].) Additionally, he failed to object to the standard statement which was correct in its general definition of the law. (See generally *People v. Cortez* (1981) 115 Cal.App.3d 395, 407.)

Assuming any error occurred, it was clearly harmless. Shannon testified for Chaney that they were married from 1998 to 2004. The police had repeatedly come to her residence during mid-2003 looking to arrest Chaney. On these occasions, they reportedly "warned" her that they would shoot Chaney if he continued to evade arrest. She repeated these statements to Chaney.

The jury was not *ordered* to assess a low credibility to Shannon simply because of the prior conviction; the jurors had the choice whether the prior conviction "ha[d] a tendency reasonably to prove or disprove the truthfulness of the testimony of [that] witness . . . ." (CALJIC No. 2.20, as given.) The jurors were specifically admonished that the fact of a prior conviction does not "destroy or impair a witness's believability. It is [but] one of the circumstances that [each juror] *may* consider in weighing the testimony of that witness." (CALJIC No. 2.23, as given; emphasis added.)

Whether the jury assessed Shannon's credibility as lessened due to her admission that she had a prior conviction for marijuana possession is highly questionable. Moreover, the evidence of Chaney's commission of the charged crime was overwhelming, irrespective of her testimony. Thus, "it is not reasonably probable that a result more favorable to [Chaney] would have been reached, even had the challenged instructions not been given." (*People v. Cortez, supra,* 115 Cal.App.3d at 407.)

C. Sufficiency of Evidence: Kidnapping During Commission of Carjacking

Chaney argues the evidence is insufficient to sustain the convictions for kidnapping the two children to facilitate a carjacking. He reiterates the record is void of

any proof that he knew the children were in the car when he commenced the carjacking.[10] As the offense requires proof that the kidnapping was done "to facilitate the commission of the carjacking"[11] (see *People v. Perez* (2000) 84 Cal.App.4th 856, 860), he concludes the evidence is insufficient to sustain the conviction because he did not intend to take the children to "facilitate" the carjacking.

As discussed above, the jury found the circumstantial evidence sufficient grounds to infer Chaney knew the children were in the back seat. Not only did Garcia refer to them when she begged him not to hurt her and the children, but there was no evidence that anything was obstructing the view from the front passenger seat into the back where the two children were sitting. We must draw all *reasonable* inferences in favor of the verdict, and sustain the jury's determination that the circumstances were sufficient to convince it of the truth of the charges. "'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence . . . it is [nonetheless] the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.'" [Citations.]' [Citation.]" (*People v. Stanley* (1995) 10 Cal.4th 764, 792-793.)

The evidence was sufficient.

D. Appellate Review of In Camera Hearing Under *Pitchess*[12]

The defense brought a pretrial motion for discovery of potentially relevant information in the personnel files of five of the officers involved in his arrest. The trial

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[10] Appellate counsel emphasizes in a footnote that the prosecutor asked Garcia whether the defendant ever referred in any way to the children, and that Garcia denied such. The record fails to support this interpretation. The prosecutor asked Garcia, "[a]t any point when he first got in the car, did he tell you 'get out of the car with your kids, I'm going to take your car'?" Garcia replied, "No." Such an inquiry and answer does not equate with not knowing the children were present.

[11] See also CALJIC No. 9.54.1, as given.

[12] See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

court determined that only two officers' files were potentially pertinent: The court ordered the custodian of records to withdraw to chambers with him where the court would review the personnel files of Keely and Holder, but the custodian was not ordered to bring the files of the other three officers. The court noted that Keely was the officer who fired the shot that hit Chaney in the leg, and Holder was present at the Lopez apartment, pursued Chaney from that location, and then used pepper spray and his baton to try to stop him. The other officers, however, were not involved in the actual arrest: Negron was present at the scene when the Garcia car was blocked by the officers, and Park and Halligan were present at the Lopez apartment but were not present at the arrest scene and did not participate in the pursuit.

After the in camera review, the trial court ordered the information concerning one incident to be revealed to defense counsel under a protective order. Chaney now requests we review the sealed transcript of the in camera hearing and the sealed documents the court reviewed in that hearing to determine if the trial court abused its discretion in its order. The Attorney General contends review is unnecessary as any complaint or action reflecting use of excessive force or dishonesty in either Keely's or Holder's file would not in any way be relevant to this criminal case. Chaney argues that his main defense was that his actions to Garcia, the children and her car were the result of his belief that such actions were necessary for his health and safety: He feared that if he were ever arrested, the Garden Grove police would attempt to kill him. Thus, the kidnapping of the Garcia family during the commission of the carjacking was necessary for his safety. Had Keely or Holder been guilty of the use of excessive or deadly force in the past, he maintains, such information would have corroborated his personal fear of all the officers.[13]

[13] We note that the original discovery motion did not purport to need such information as corroboration of any duress or necessity defense. To the contrary, the defense rested its entire request on the information's relevance to establish *self-defense* and the officers' alleged attempts to lie and cover up the improper use of lethal force.

An appellate court has the discretion to review sealed transcripts and information to determine whether the trial court abused its discretion in its discovery order pursuant to *Pitchess v. Superior Court, supra,* 11 Cal.3d 531.[14] (See e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1230.) We received the sealed reporter's transcript of the in camera hearing, which was already part of the record on appeal, and thus denied Chaney's motion to augment the record with it. We reviewed the materials to determine if the trial court's discovery order was an abuse of its discretion. No evidence of any discretionary abuse was found; the trial court's order was proper and well supported by the record.

III

DISPOSITION

The judgment is affirmed sending Chaney to prison for two indeterminate life terms after serving 10 years.

SILLS, P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.

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[14] The trial court stated that it found "the [Public Defender's] office has shown good cause to get into some of the officers' records, but not all. And I do find that good cause has been shown for . . . Officer Keely since he's the shooter in the incident; and then as to Officer Holder who allegedly swung a baton at the defendant possibly striking him one or more times. [¶] [¶] And so the [defense] gets a green light as to Keely and Holder for an in camera . . . hearing, but a negative . . . as to officers Negron, Halligan and Park." The trial court then took a "short recess," returning to the bench and announcing, "[t]he court has conducted an in camera hearing in reference to personnel files of two of the officers, as indicated previously, and there is some discoverable material. And I'm going to ask that the attorney for the City of Garden Grove provide the required information under the Evidence Code to counsel for Mr. Chaney." A protective order was drawn up, requiring the disclosed information to be kept confidential from all but the defense attorney and immediate staff.